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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

DAVID CHAGALL,
PETITIONER

vs.

BARRY SOBEL, M.D., et al.,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OCTOBER TERM, 1991

DAVID CHAGALL, Petitioner

vs.

BARRY SOBEL, M.D., et al., Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

STATEMENT OF THE CASE

This case arises out of a letter to the editor of the local newspaper in the community of Agoura Hills. Petitioner was a community activist who was orchestrating

a grass roots effort to recall four city council member during a period of political upheaval over community development. This case focuses on a letter to the editor regarding petitioner and his involvement with the political debate in the community.

Petitioner's First Amended Complaint was the subject of Demurrer by respondent, the Demurrer raising issues of the perceived constitutional protection for matters of personal opinion. The Demurrer was sustained without leave to amend.

After the Order of Dismissal was signed, petitioner sought reconsideration based upon this Court's decision in Milkovich v. Lorain Journal Publishing Co. (1990) 497 U.S.___ , 110 S.Ct. 2695, 111 L.Ed.2d 1. The Milkovich case was decided three days post-dismissal of petitioner's action against respondent. The Motion for Reconsideration was strongly opposed and

argued for Demurrer under an analysis of the California Constitution and California cases interpreting those provisions. In focusing on the California Constitutional provisions as well as California case law interpreting those provisions, the trial Court renewed its ruling of sustaining the Demurrer without leave to amend, focusing on the California Constitution and the California case law.

Before the California Court of Appeal, Second Appellate District, petitioner sought review of the trial Court's ruling. In affirming the decision of the trial Court, the Court of Appeal had before it not only the record in the case at Bench but the Milkovich opinion as well as California case law incorporating its opinion. (See Moyer v. Amador Valley J. Union High School District (1990) 225 Cal.App.3d 720.) The Court of Appeal, while declining to decide the issue of

retroactivity of the Milkovich decision, affirmed the ruling of the trial Court, and held that they would not make actionable the exercise of speech that was not actionable in California at the time it was made. (See decision of the Court of Appeal of the Second Appellate District, page 10)

The California Supreme Court, on Petition for Review, had before it the opinion of the California Appellate Court and the long standing California case precedent in its support. The California Supreme Court denied petitioner review.

SUMMARY OF ARGUMENT

The three grounds asserted by petitioner for granting this Writ of Certiorari are ill founded; the bases submitted by petitioner do not entitle him to review by this Court.

The ruling of the California State Courts was based upon adequate and independent State grounds. The California Court held that it would not make actionable that which was protected speech when it was made. Subsequent California cases have affirmed that the long standing analysis by which to analyze this dichotomy between fact and opinion is by using the totality of the circumstances test. There are adequate and independent State grounds to support the California Court's decision.

Even in light of Milkovich and a determination that it is applicable to the case at bench, the California Appellate

Court and the California Supreme Court rendered opinions consistent and in light of Milkovich. Not only was the Milkovich analysis and holding incorporated, but post-Milkovich California Appellate Court cases have interpreted and followed Milkovich.

In light of petitioner's status as a public figure in a matter which was an issue of public concern, the analysis under Milkovich would not change the ruling of the California State Courts.

1. PETITIONER HAS NOT ASSERTED A PROPER GROUND FOR SUPREME COURT REVIEW THEREBY JUSTIFYING DENIAL OF THIS PETITION FOR WRIT OF CERTIORARI.

Petitioner has asserted three grounds for granting this Petition for Writ of Certiorari: That the California State Courts denied him a federal right by basing their decision on the California State Constitution and California case law then in effect; That he was further denied this federal right by the imposition of a non-federal ground of decision without fair support; and, That petitioner was denied his right to trial by jury.

Each of these alleged bases for granting this Petition are ill founded as pertaining to the case at bench.

Initially, it is difficult to determine what federal right petitioner claims he has been denied by the California Courts

basing their ultimate decision on the California Constitution and the California case law. Assuming that the federal right to which petitioner claims denial is the right to have a jury adjudicate his claim, neither the California Court, nor the federal Court system, allow a claim to be pursued when, as a matter of law, a claim cannot be stated against an opposing party.

Petitioner claims that he was denied this right when the California trial Court based their decision on the California State Constitution and California case law. Contrary to petitioner's assertion, the ruling of the trial Court was made with fair support of State grounds. There are adequate and independent State grounds for the decision of the California trial Court and the subsequent affirmation by the California Appellate Courts.

2. THERE ARE ADEQUATE AND INDEPENDENT CALIFORNIA STATE GROUNDS UPON WHICH PETITIONER'S CLAIM WAS DECIDED JUSTIFYING DENIAL OF THIS PETITION.

The grounds of the trial Court in sustaining petitioner's Demurrer without leave to amend, as affirmed by the California Appellate Courts, are based on adequate and independent State grounds and do not entitle petitioner to review in this Court. The rule that the Supreme Court has no jurisdiction to review a case if the judgment is supported by adequate state grounds is based on the observation that the adequate state ground controls the result with the case, no matter what the Supreme Court may say about the merits of the federal issue. Zacchini v. Scripps-Howard Broadcasting Co. (1977) 433 U.S.562, 97 S.Ct. 2849, 53 L.Ed.2d 965.

The California Constitution provides its citizenry the following assurances

regarding the right to speak freely by proclaiming that every person may freely speak, write and publish his or her own sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press. California Constitution, article 1, section 2(a).

In 1986 the California Supreme Court decided Baker v. Herald Examiner (1986) 42 Cal.3d 254. In that decision, the Court held that the Court must apply the Constitution by carefully distinguishing between statements of opinion and fact, treating the one as constitutionally protected and imposing on the other civil liability for its abuse. Baker, supra, at 259. However, the Court went on to discuss what utterances are worthy of constitutional protection and found that the totality of the circumstances test is used to determine what is defamatory and

what is rhetorical hyperbole. Baker, supra at 260. The Court then applied a totality of the circumstances test to determine what, in fact, is opinion and what is defamatory. The Court specifically looked to the arena in which the utterance was published.

Following the Milkovich decision, the California Appellate Court decided Moyer v. Amador Valley J. Union High School District (1990) 225 Cal.App.3d 720. In that case, the Appellate Court had to decide whether or not the statements published in a story in a high school student newspaper were defamatory. In affirming the trial Court's sustaining of defendant's Demurrer without leave to amend, the Court of Appeal held that the statements about the appellant were not actionable. The Moyer Court noted the perceived fundamental distinction between statement of fact and statements of

opinion held by the California Courts. The California Court had employed a "totality of the circumstances" test to differentiate between fact and opinion:

"First, the language of the statement is examined. For words to be defamatory, they must be understood in the defamatory sense.... Next, the context in which the statement was made must be considered.... This contextual analysis demands that the courts look at the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication was directed." Moyer, supra, at 724 (see also Baker v. Los Angeles Herald Examiner, supra.)

The Court went on to note that Milkovich did not substantially change these principals; rather, it underscored the necessity for a reviewing Court to make an independent examination of the whole record in order to insure that there

is no infringement of free expression. The Court continued by analyzing the circumstances of the individual case within the 'totality of the circumstances' test and within the analysis and in light of the decision in Milkovich.

In July, 1991, the California Appellate Court decided Weller v. American Broadcasting Companies, Inc. (1991) 232 Cal.App.3d 991. Although the Court found that the statements made by defendants could be understood in a defamatory sense, it applied the totality of the circumstances analysis within the considerations of the Milkovich decision. It reiterated and affirmed the High Court's decision that, the Bresler-Letter Carriers-Falwell line of cases provide protection for statements that cannot 'reasonably be interpreted as stating actual facts' about an individual because it is expressed in loose figurative and

hyperbolic language, and/or the context and tenor of the statements negates the impression that the author is seriously maintaining an assertion of actual fact. Weller, supra, at 1000, 1001. See Greenbelt Pub. Assn. v. Bresler (1970) 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6.; Old Dominion Branch No. 496, etc. v. Austin (1974) 418 U.S. 264, 94 S.Ct. 2770, 41 L.Ed.2d 745; Hustler Magazine v. Falwell (1988) 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41.

California State Courts as well as the Federal Courts have acknowledged the difficulty in distinguishing fact from opinion. As Justice Bork opined, "I start with candid recognition that the universe of statements cannot be neatly divided by some logically discernable equator into hemispheres of fact and opinion. Fact is the germ of opinion, and the transition from assertion of facts to expression of

opinion is a progression along a continuum. A reviewing Court's charge is to determine, in light of the considerations inspiring first amendment jurisprudence and the surviving policies underlining common law protection of reputation, the point at which we should draw the line marking off the portion of speech to be accorded the absolute constitutional protection of opinion rather than the conditional privilege afforded representations of fact." Ollman v. Evans (D.C.Cir.1984) 750 F.2d 970 at 1021.

The Moyer Court noted the recent decision of the high Court in Milkovich but recognized that Milkovich does not change substantive California law in this area as analyzed post-Milkovich by the California Courts. Existing constitutional doctrine remained operative to protect free expression of ideas. That is,

statements that cannot be "reasonably interpreted as stating actual facts" are still entitled to constitutional protection. Moyer, supra, at 724. The reviewing Court then conducted their analysis based upon California case law precedent and using the totality of the circumstances test. The Court looked to the audience to whom the publication was addressed and whether or not the statement could be understood to state actual facts. Further, in determining the issue, the Court considered the nature and meaning of the language used, including the context in which the statements appeared. Moyer, supra.

In looking at the history of the California Court's analysis of the distinction between fact and opinion, the California Courts have long been using a totality of the circumstances test to analyze whether or not a statement is fact

or opinion, providing constitutional protection to those utterances which are determined to be opinion. This is consistent with the Milkovich opinion.

The California Supreme Court and the Courts thereunder which have, since Baker v. Herald Examiner, supra, used a totality of the circumstances test to analyze and provide constitutional protection for those utterances found to be opinion, and providing recourse for those which are not, is adequate to justify the opinion of the California Courts in the case at Bench. The Supreme Court's jurisdiction to review a State Court decision under 28 USCS 1257, whether by appeal or certiorari, is dependant upon the presence of a federal question in the case. The reason for this requirement is that the Supreme Court is not a Court of general jurisdiction which can correct any error in State Court proceedings. Its powers

are limited to correct denials of federal rights in specific instances. Waters Pierce Oil Company v. Texas (1909) 212 U.S. 86, 29 S.Ct. 220, 53 L.Ed. 417. Petitioner's Writ of Certiorari should be denied.

3. ASSUMING THE APPLICABILITY OF MILKOVICH, THE PETITION SHOULD BE DENIED AS THE ANALYSIS WITHIN MILKOVICH WOULD NOT REQUIRE CORRECTING ANY DENIAL OF A FEDERAL RIGHT TO PETITIONER.

Milkovich did not substantially change the principal analysis performed by California Courts which have been applying the totality of the circumstances test at least since the California Supreme Court decision in Baker. Milkovich, underscored the principal that a reviewing Court must make an independent examination of the whole record in order to insure that there

is no infringement of free expression. Milkovich, Id.

Petitioner was a public figure. He threw himself into the middle of a public debate on community development by orchestrating a grass-roots effort to recall four city council members. The local community newspaper was the home of many letters to the editor regarding the hotly debated political issues. Petitioner was himself the author of letters to the editor pertaining to these issues.

Before Milkovich, the California Courts had employed a "totality of the circumstances" test to differentiate between fact and opinion.... Baker, supra, at 260-261. Milkovich did not substantially change these principals; it underscored that in cases such as this, raising First Amendment issues, a reviewing Court must make independent

examination of the whole record in order to insure that there is no infringement of free expression. Milkovich, 497 U.S. at p.__, 111 L.Ed.2d at p.17. Moyer, supra, at 724. Existing constitutional doctrine remained operative to protect free expression of ideas. That is, statements that cannot be "reasonably interpreted as stating actual facts" are still entitled to constitutional protection." The question is one of law for the Court. Baker, supra, at 260; Moyer, supra, at 724; Koch v. Goldway (9th Cir. 1987) 817 F.2d 507.

Determining reasonableness, as a matter of law, encompasses an analysis of the totality of the circumstances. In affirming the trial Court's dismissal of the Complaint, the California Appellate Court applied an analysis under the California Constitution and California cases. Those California cases have, since

well before the utterance which gives rise to this lawsuit, conducted an analysis under a totality of the circumstances test.

Where potentially defamatory statements are published in a public debate, a heated labor dispute, or in another setting in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion. Baker, supra, at 260. It is common knowledge to the average reader that the editorial page is the traditional location of a publication's opinions and frequently the conflicting opinions of others. It is typically devoted to a discussion of ideas, not the transmission of the news.

Grillo v. Smith (1983) 144 Cal.App.3d 868, 874.

In considering the totality of the circumstances, the Court must factor into the equation the extent to which the issue is one of public concern. The public has an interest in receiving information on issues of public importance even if the trustworthiness of the information is not absolutely certain. The first amendment is served not only by articles and columns that purport to be definitive but by those articles that, more modestly raise questions and prompt investigation or debate. By giving weight on the opinion side of the scale to cautionary and interrogative language, Courts provide greater leeway to journalists and other writers and commentators on bringing issues of public importance to the public's attention and scrutiny. Ollman v. Evans, supra, at 983.

In applying California cases to the facts of the case at Bench, even in light of the decision in Milkovich, the result is the same. Milkovich held that there is no separate first amendment privilege of opinion, but recognized the existing Constitutional doctrine to protect free expression of ideas. Statements that cannot be "reasonably interpreted as stating actual facts" are still entitled to Constitutional protection. Milkovich, 497 U.S. at p.__, 111 L.Ed.2d at p.19; See Also Hustler Magazine v. Falwell (1988) 485 U.S.46, 50, 57, 99 L.Ed.2d 41, 48, 53, 108 S.Ct. 876.

A reviewing Court must make an independent examination of the whole record in order to insure that there is no infringement of free expression. Milkovich, Id. A review of the whole record by the reviewing California State Court justified affirmation of the trial

Court's holding. In applying the 'totality of the circumstances' test and reviewing the whole record, the California Courts came to their decision by an analysis consistent with California precedent, yet incorporating the Milkovich opinion.

The powers of the Supreme Court need not be invoked in the case at Bench as there is no federal right to be corrected. If the State Court holds that a federal question was properly presented according to State practice, and proceeds to determine it, the United States Supreme Court will not further inquire into the matter. Miedreich v. Lauenstein (1914) 232 U.S. 236, 58 L.Ed. 584, 34 S.Ct. 309.

CONCLUSION

The three grounds asserted by petitioner for granting the Writ of Certiorari are ill founded as the federal right which he claims to have been denied,

the right to a trial by jury, is only applicable if it is determined, as a matter of law, that a claim can be stated. In this case, the California Courts have determined that, as a matter of law, petitioner cannot state a claim against respondent. The California Appellate Courts, in affirming the trial Court's dismissal, had before them California case law precedent and the decision of Milkovich as interpreted by California case law in affirming the dismissal by the trial Court of petitioner's Complaint.

Petitioner threw himself into the political arena by his grass-roots effort to recall city council members within a public debate regarding community development. By doing so, and by himself submitting letters to the editor for publication on this very issue, he invited differing comment. The editorial page is the traditional location of a

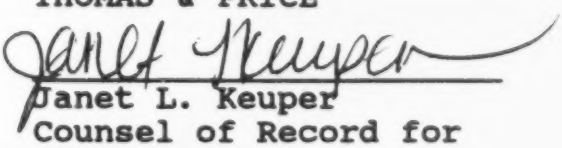
publication's opinions and frequently the conflicting opinions of others. The California Courts have determined that, within the totality of the circumstances and looking at the whole record to insure that there is no infringement of free expression, petitioner could not state a claim as a matter of law.

It is therefore respectfully requested that the Petition For Writ of Certiorari be denied.

DATED: March 19, 1992

Respectfully submitted,

THOMAS & PRICE



Janet L. Keuper
Counsel of Record for
Respondent
Barry Sobel

DECLARATION OF FILING
28 USC § 1746

I, Janet L. Keuper, do swear and declare that on this date, MARCH 23, 1992, pursuant to Supreme Court Rules 29.3 and 29.4, I have filed 40 copies of the enclosed RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI with the United States Supreme Court by depositing an envelope containing the above documents in the United States mail properly addressed and with first class postage prepaid and in accordance with 28 U.S.C. § 1746 addressed as follows:

Clerk, the
United States Supreme Court,
1 First Street, N.E.,
Washington, D.C. 20543

By: Janet Keuper
Janet L. Keuper, Declarant

PROOF OF SERVICE

I, Janet L. Keuper, do swear and declare that on this date, MARCH 23, 1992, pursuant to Supreme Court Rules 29.3 and 29.4, I have served the enclosed RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first class postage prepaid and in accordance with 28 U.S.C. § 1746.

The names and addresses of those served are as follows:

3 copies to:
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Janet L. Keuper, Declarant